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No. 03-970

In The
Supreme Court of the United States

DEAN SCHMITZ,

Petitioner,

v.

M & M/MARS, a division of M & M Mars, Inc., a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT M & M/MARS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Respondent M&M/Mars ("Mars") certifies as follows:

M&M/Mars is an unincorporated division of Mars, Incorporated. Mars, Incorporated is a privately held company. No publicly held company owns ten percent or more of Mars' stock.

DATED: February 4, 2004

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REASONS FOR DENYING THE WRIT

Dean Schmitz makes four arguments in support of his petition for writ of certiorari. Each argument should be rejected for the reasons set forth below.

I. THE CIRCUIT COURT'S DECISION IS CONSISTENT WITH ESTABLISHED LAW

A. The Ninth Court Applied The Correct Standard Of Review

The District Court found that Mars retaliated against Schmitz in 2000 by refusing to interview him for the RSS position in 2000 even though it had a legitimate, non-pretextual reason for not interviewing him. The legitimate reason involved Mars' concern over Schmitz's flagrant misuse and misappropriation of Mars' proprietary letterhead and logo.

On Mars' cross-appeal, the Ninth Circuit reversed the District Court's finding that Mars had unlawfully retaliated against Schmitz in 2000. In the first argument advanced in his Petition, Schmitz argues that the Ninth Circuit applied the wrong standard of review on Mars' cross-appeal. Schmitz is wrong.

First, the Ninth Circuit determined that the District Court had erred in attempting to determine the "sufficiency" of Mars' non-pretextual reason for refusing to interview Schmitz for the RSS position in 2000. (Petition at 4a-5a.) This question is a mixed question of law and fact because it necessarily involves the legal question whether a district court can conclude there was retaliation even though it has found, as fact, that the employer presented a legitimate, non-pretextual reason for its personnel

decision. *See e.g., Mills v. Health Care Service Corp.*, 171 F.3d 450, 459 (7th Cir. 2000) (the court cannot "sit as a 'super-personnel department' with plenary authority to review (defendant's) business decisions"). As a mixed question of law and fact, the Ninth Circuit correctly employed a de novo standard of review. (Petition at 5a, citing *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001).)

Second, under this Court's precedent, "if a district court's findings (of fact) rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (noting also, at 290, that "conclusions on mixed questions of law and fact are independently reviewable by an appellate court," citing, e.g., *Bogardus v. Commissioner*, 302 U.S. 34, 39 (1937)). Here, the Ninth Circuit reversed the District Court's judgment against Mars because the District Court erred as a matter of law in holding that Mars retaliated against Schmitz in 2000 even though it had a legitimate reason for not interviewing him. This ruling falls squarely within the ambit of independent review authorized by *Pullman-Standard* and *Bogardus*.

Finally, Schmitz's quibble with the standard the Ninth Circuit used in analyzing the District Court's decision apparently arises from Circuit Judge Fisher's concurring opinion. However, Schmitz has not told the full story about Judge Fisher's opinion. In fact, Judge Fisher concurred with the result the majority reached irrespective of what standard was used in analyzing the District Court's findings. (8a-10a.) In Judge Fisher's view, the "district court erred in conducting a 'sufficiency' analysis after determining that one of Mars' proffered reasons for its actions was not pretextual." Thus, the Ninth Circuit's

conclusion would remain the same even under Schmitz's proffered "clear error" standard.

B. The Ninth Court Applied The Correct Rule Of Law Applicable In Pretext Cases

The law of pretext requires, for a finding of illegal retaliation in a case tried under the framework of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), that "all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's decision," *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 148 (2000). Consistent with *Reeves*, the Circuit Courts have held that a Title VII plaintiff show that all of an employer's proffered legitimate, nondiscriminatory reasons are pretextual in order to establish liability. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (5th Cir. 2001), *cert. denied*, 535 U.S. 1078 (2002); *Mills v. Health Care Service Corp.*, 171 F.3d 450, 459 (7th Cir. 2000); *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 2000); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 202 (4th Cir. 1999); *Wilking v. County of Ramsey*, 153 F.3d 869, 874-5 (8th Cir. 1998); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); *Odima v. Westin Tucson Hotel Corp.*, 991 F.2d 595, 600 (9th Cir. 1993).

Given this established state of the law, Schmitz's second issue, that an employer in a pretext case who proffers a legitimate nondiscriminatory reason for its personnel decisions could nevertheless still be found liable for retaliation, is simply unsupportable. The District Court erroneously concluded that Mars had retaliated against Schmitz in denying him the opportunity to interview for a position in 2000 even though it explicitly found as fact that

"Schmitz should not have been using company letterhead and envelopes after the layoff. Schmitz used Mars' letterhead and logo on multiple occasions in 1999-2000 after having been separated from Mars. . . . *Mars was justifiably concerned* with that use of letterhead." (Petition at 20a (emphasis supplied).) Having found Mars' concern about Schmitz's misuse of its letterhead and logo (in the job application) to be a non-pretextual basis for denying Schmitz an interview (Petition at 21a), the District Court was bound to properly apply the law of pretext and find Mars to be not liable for retaliation. The Ninth Circuit correctly so held.

In addition, Schmitz cites no precedent, and none exists, to support his novel approach of flatly disregarding legitimate nondiscriminatory reasons. In light of Schmitz's own improper conduct of misappropriating and misusing Mars' property after he left Mars, this is not a proper case to be undertaking the wholesale revision of Title VII pretext law that Schmitz requests.

II. SCHMITZ'S NEW ARGUMENTS ON APPEAL TO THE NINTH CIRCUIT AND THIS COURT SHOULD BE REJECTED

A. Schmitz Never Invoked Mixed Motive Analysis

Schmitz's third contention that the Ninth Circuit ignored *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) is baseless. Schmitz prosecuted this case for years in discovery, through multiple rounds of summary judgment briefing, and then through a full trial and judgment by the District Court, as a "pretext" case in which he alleged that the legitimate reasons offered by Mars for its actions were

pretextual. Indeed, Schmitz admits that his case "was not analyzed under a mixed motive framework . . ." (Petition at 11), and that "[t]he Costa opinion issued after the case at bar had been tried, decided, appealed and briefed. Schmitz discussed it with the (circuit) court at oral argument." (Petition at 14, n.2.)

While the *Desert Palace* decision was not issued until after this case had been briefed to the Ninth Circuit, the mixed motives analysis that Schmitz now advances was certainly in existence well before this case was filed, tried, decided, appealed and briefed. Schmitz's belated attempt to ask the Ninth Circuit at oral argument to review this case under a mixed motives analysis was correctly rejected. Further, any attempt by Schmitz to change the outcome of a case based on arguments not presented below is inappropriate. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991) ("failure to raise or brief an issue in a timely fashion may constitute waiver of the issue on appeal.")

B. Neither The Record Below Nor The Ninth Circuit Decision Raise The Fourth Question Schmitz Proffers To This Court

Schmitz's fourth question seeks to obtain a ruling from this Court on a novel legal issue that has never been presented to any court of which Mars is aware. Specifically, Schmitz asks this Court to rule that an employer's alleged "categorical denial" of harassment should lead to a judgment for plaintiff if plaintiff establishes a prima facie case of hostile environment harassment. No case support is cited for this argument.

However, Schmitz failed to present a "prima facie case" of hostile environment retaliation, as the Ninth

Circuit noted (Petition at 4a), making Schmitz's "issue four" totally baseless. By way of background, Schmitz's fourth argument relates to his claims that his African-American manager, Carl Ruffin, harassed him in 1995-96 in retaliation for Schmitz's alleged "race neutral treatment" of Schmitz's African-American subordinates, Daryl Bell and Sofia Monteblanco. (This "race-neutral treatment" by Schmitz consisted of his wanting to fire Bell and Monteblanco.) After hearing the evidence, the District Court rejected Schmitz's claims, concluding that Schmitz "failed to establish by a preponderance of the evidence that the harassment was based on Schmitz's, or anyone else's race. Therefore, that conduct was not in violation of Title VII, on either a hostile environment or a retaliation claim for relief." (Petition at 20a-21a.) Thus, Schmitz failed to establish a "prima facie case" of hostile environment harassment.

On appeal, the Ninth Circuit upheld the District Court's decision based on the specific factual findings that (1) Schmitz never reported allegations of race-based harassment to Ruffin's manager; (2) when Schmitz reported such allegations to Mars' personnel office, Mars investigated them and determined that Ruffin's treatment of Schmitz was not based on race; (3) Schmitz always received "meets expectation" reviews from Ruffin and other managers; and (4) Schmitz's recommendations to fire Bell were reviewed by a panel of managers, including Caucasians as well as Ruffin, and the entire panel disagreed with Schmitz. (Petition at 3a-4a.)

Schmitz's fourth issue would have this Court ignore the actual fact findings and decision of the District Court. Schmitz failed to prove that Ruffin's conduct was motivated by any unlawful animus as demonstrated by the

aforementioned fact findings among others. (Petition at 20a-21a.) Schmitz's request that this Court issue novel legal rulings on abstract issues not presented to the courts below is utterly absurd.

In short, Schmitz's fourth argument should be rejected since it involves questions that are completely disconnected from the proceedings that actually took place in the courts below.

III. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

The Ninth Circuit's decision was unanimous and unpublished, indicating that the panel deciding the case recognized its limited precedential value. Schmitz's petition for en banc review did not draw a single vote of support. (Petition at 25a.) Schmitz cites no issue of law of any importance whatsoever, much less of any sufficient importance, that this Honorable Court must attend to it. This case presents no issue in which there is a conflict in the Circuit Courts. It presents no issue of constitutional or statutory interpretation. In short, it presents nothing but a last desperate attempt by a losing litigant, yet nothing is presented here to suggest that any wrong has been done him by the various courts that have already reviewed this case in detail. The unanimous Ninth Circuit decision was proper in all respects.

CONCLUSION

Mars has no liability to Schmitz based on any of the claims that he asserted. Schmitz's petition for certiorari should be denied.

RESPECTFULLY SUBMITTED this 4th day of February, 2004.

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